Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1163

FELIX WALLS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

The petitioner herein respectfully moves this Honorable Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on May 14, 1974.

Intervening circumstances of substantial or controlling effect coupled with an apparent conflicting decision of another U.S. Court of Appeals form the basis of this petition for rehearing, specifically:

I. Subsequent to petitioner's conviction and unknown to petitioner's counsel, an agent of the Bureau of Narcotics and Dangerous Drugs (BNDD) was indicted by a Federal Grand Jury in Alton, Illinois on the charges: (1) PERJURY before a Federal Grand Jury, (2) depriving persons of their constitutional right against unreasonable searches and seizures, and (3) depriving

persons of liberty without due process of law. *U.S. v. Bloemker* (No. S-CR-7380, U.S.D.C. SD, Ill. April, 1974, Opinion not yet in print).

The agent referred to above, William C. Dwyer, was the sole eye-witness, who testified that "through the use of special binoculars," he witnessed contraband being transferred from petitioner to a government informant. This testimony served as the basis for petitioner's conviction.

Throughout petitioner's trial, in his appellate briefs and his petition for certiorari to this Court, petitioner maintained that his conviction was a direct result of perjurious testimony by government narcotic agents.

The subsequent indictment for perjury of the same eye-witness narcotic agent, as in the instant case, warrants a rehearing upon the collateral issue raised by the petitioner in his Petition for Certiorari, specifically the question of whether:

> The trial court committed reversible error when after denying defendant's motion to allow the jury to view the scene of the alleged transfer of heroin (T. 506) and after several defense witnesses testified as to the conditions presently at the scene, instructed the jury that conditions at the scene had markedly changed and a view of the scene would only confuse the jury, thereby in effect testifying and undercutting the testimony of several defense witnesses and ultimately defendant's case. (Petition for Certiorari, *Walls v. U.S.*, October Term, 1973, No. 73-1163, p. 9)

Indeed the whole tenor of the indictments in *U.S. v. Bloemker, supra,* bears a striking resemblance to the considerations necessarily involved in the instant case.

II. The U.S. Court of Appeals for the District of Columbia in *United States v. Lynch*, U.S. App. DC No. 71-1803, May 7, 1974, a recent opinion authored by Judge Wade McCree of the Sixth Circuit, Court of Appeals, vacated defendant's conviction for first-degree murder, holding in part:

> . . . where the evidence indicates that a crucial government witness, who is physically and mentally capable of testifying, is within the jurisdiction of the court, the prosecution must demonstrate that it has been unable to obtain the witness' presence through a search

> exercised both in good faith and with reasonable diligence and care. . . .

In the instant case, the government, just prior to trial, unexplainably announced that its government informant was "unavailable as a witness." However, petitioner's motion for judgment of acquittal was denied and affirmed by the Sixth Circuit Court of Appeals.

This new decision is apparently conflicting in as much as the author of the opinion of the U.S. Court of Appeals for the District of Columbia, also sat as a member of the Sixth Circuit panel which in affirming petitioner's present conviction in the Michigan District Court ruling, refused to apply the same "unavailable witness" standard, as authored in the U.S. District of Columbia Circuit Court of Appeals.

In fact, the unavailable witness principle, which was established in *United States v. Lynch, supra* was egregiously violated by the Michigan District Court below as outlined in the petitioner's Petition for Certiorari before this court.

> The refusal of the court to accept evidence that the missing government informant had made a statement incriminating himself and exculpating defendant violated Federal Rule 804(b)(4). (See Petition for Certiorari, *Walls v. U.S.*, October Term, 1973, No. 73-1163, p. 6)

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

Counsel for Petitioner
Wilfred C. Rice

Of Counsel;
Woodrow Boggs, Jr.

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CERTIFICATE OF SERVICE PETITION FOR REHEARING FOR A WRIT OF CERTIORI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

I hereby certify that a copy of the Petition for Rehearing for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit was served by mail, postage prepaid this 6th day of June, 1974, upon Robert H. Bork, Solicitor General, Department of Justice, Washington, D. C. 20530 and Ralph B. Guy, Jr., United States Attorney, 815, Federal Building, Detroit, Michigan 48226.

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